82-88

No. ____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

In re MARILYN RICE

Concerning A Matter In
The District Of Columbia Court Of Appeals

PETITION FOR A WRIT OF MANDAMUS

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OBJECTIVE OF PETITION

This petition seeks a writ of mandamus to compel three judges of an appeals court to rule on the issue that was presented to them for review.

*

The judges against whom relief is sought are the following, of the District of Columbia Court of Appeals:

The Honorable Julia Cooper Mack, Associate Judge

The Honorable William C. Pryor, Associate Judge

The Honorable Hubert B. Pair, Associate Judge, Retired

PARTIES INVOLVED

The action out of which this petition grows is *Marilyn Rice* v. *Dr. John E. Nardini and the Psychiatric Institute of Washington*, No. 81-996, in the District of Columbia Court of Appeals.

Also to be considered parties in the sense that the action intimately concerns them are the following attorneys:

James C. Gregg, Esq.

Peter R. Sherman, Esq.

Philip G. Sunderland, Esq.

Bruce J. Terris, Esq.

Raymond A. Yost, Esq.

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Moore's Federal Practice, Vol. 7

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Other references 20a, 23a, 27a

Stern, Robert L.: Appellate Practice in the United States, 1981, Chapter 10 ..... 18a

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28 U.S.C. 1257 2

28 U.S.C. 1257(3) 3

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In re MARILYN RICE

PETITION FOR A WRIT OF MANDAMUS

BASIS OF SUPREME COURT JURISDICTION

The jurisdiction of the Supreme Court is invoked under 28 U.S.C. 1651(a).

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

*

Supreme Court Rule 26 requires that an extraordinary writ, such as a writ of mandamus, should be in aid of the Supreme Court's appellate jurisdiction.

The writ that petitioner requests would conform with this requirement in two different but related senses—first as concerns a class of cases where deprivation of federal rights escapes remedy, and second as concerns the particular facts of petitioner's particular case in a state court.

(1)

The U.S. Supreme Court has the power and duty to enforce the United States Constitution. Through a series

of early rulings, principally *Marbury v. Madison* in 1803, the Supreme Court established itself as the final authority as to whether a law or action conforms with the letter or intent of the Constitution. Its eminence in this regard is normally exercised by appellate review of cases from other courts. Acknowledgment of such appellate jurisdiction over the federal court system is now embodied (mainly) in 28 U.S.C. 1254, and over the state court systems, including that of the District of Columbia, in 28 U.S.C. 1257, which statutes the Supreme Court interprets.

The requested writ would be in aid of the Supreme Court's appellate jurisdiction *in all courts, federal and state* in that it would, for the first time, recognize and remedy a form of judicial partiality that could become operative in any court. Only exceptional circumstances bring this partiality into play but, when activated, it tends to void the equal protection of the laws to which citizens are entitled under the Constitution.[1] This is

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[1] The first section of the Fourteenth Amendment provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Strictly speaking, the Equal Protection Clause of the Fourteenth Amendment refers only to the states. It prohibits denial of equal protection by their legislative, executive, or judicial authorities but does not prohibit denial by the corresponding federal authorities. However, where necessary, the Due Process Clause of the Fifth Amendment, which does refer to actions by federal authorities, is construed as broad enough to comprehend a guarantee of equal protection.

especially so as the person denied protection cannot obtain relief in any other form or from any other court.

Further discussion of this "loophole" situtation is postponed to the section of this petition entitled "A Nationwide and Profession-wide Problem."

(2)

The requested writ of mandamus would also be in aid of the Supreme Court's appellate jurisdiction in the narrower sense that petitioner's particular case, which comes from a state court, can be construed as containing a "federal question" within the terms of 28 U.S.C. 1257(3). This code section gives the U.S. Supreme Court appellate jurisdiction over a state court

> "where the validity of a treaty or statute of the United States is drawn in question or where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

It happens that the question petitioner presented to the D.C. Court of Appeals for review, and which that court refused to rule on, asked for interpretation of a U.S. Supreme Court doctrine, but this presumably would not be a federal question within the purview of the code section because it does not draw in question a U.S. statute or treaty.

However, the case turned, so to speak, on a different question, and one that directly involved constitutional rights. This question was "specially set up" in the Appellant's Reply Brief of petitioner. Here petitioner, having reason to fear that the D.C. Court of Appeals would avoid

ruling fairly on the issue presented, specifically asked whether the court could rule without bias in the circumstances. In effect she was claiming a "right . . . under the Constitution," a right to equal treatment or protection. At the time, petitioner, a layman, had no foresight of this petition to the Supreme Court or that such a question could be relevant or that it should be couched in such and such a way, but she was reminding the judges of her right to a disinterested ruling in a situation where the facts and law were cut and dried and the only real question was with regard to their own partiality.

She believes that the following passage from *Green Bay & Mississippi Canal Company* v. *Patten Paper Company*, 172 U.S. 58, 67 (1898), well expresses the latitude of discretion the Supreme Court may exercise if it chooses in recognizing a claim to federal rights:

> "No particular form of words or phrases has ever been declared necessary in which the claim of Federal rights must be asserted. It is sufficient if it appears from the record that such rights were specially set up or claimed in the state court in such manner as to bring it to the attention of that court."

From the record to be presented in this petition, the Court may judge whether federal rights were asserted (and denied).

*

As required by Supreme Court Rule 27, there is appended hereto (as Exhibit D) a copy of the judgment in respect of which this writ is sought, namely the District of Columbia Court of Appeal's *Memorandum Opinion and Judgment*, filed April 8, 1982. See also petitioner's ensuing *Motion for a Ruling on the Issue Presented for Review*, April 19, 1982 (Exhibit E); and the Court's *Order* denying the motion, May 5, 1982 (Exhibit F).

STATEMENT OF THE CASE

Petitioner is a former economist, accountant, and statistician, now retired as the result of iatrogenic injuries. These were the occasion of a medical malpractice suit in the Superior Court of the District of Columbia, *Marilyn Rice v. Dr. John E. Nardini and the Psychiatrict Institute of Washington*, CA 703-74, decided for the defendants in January 1977.

Since that time, petitioner has sought to expose the trial of the case as a completely fraudulent proceeding. Many prominent doctors and lawyers were involved, and her efforts have not been welcomed in the medical and legal communities—indeed, have uniformly met with rebuffs. Her allegations have now led to a similar situation with three appeals court judges. They refuse to rule on the proper procedure for making a formal legal complaint.

As the nature of the fraud (more exactly, of petitioner's allegations) is of importance in connection with the judges' refusal to rule, petitioner begins with the original fraud situation in sketching the events which have culminated in the judges' recalcitrance.

A sham trial

The subject fraud began long before the trial, most conspicuously in the defendants' production of newly-minted "records," to which petitioner's counsel, though informed of their spurious character by petitioner, raised no objection. Then, immediately prior to the trial, petitioner's counsel refused to argue her case. Thereupon a "trial" took place without an issue but with a great deal of entertainment as the medical witnesses on both sides pronounced the plaintiff insane and the attorneys on both sides presented spurious documentary evidence to prove the charge. In this way were her serious allegations in the case invalidated.

There was much more to this fraud than the false documents but petitioner has constantly emphasized them because fraud in such form is elementary and concrete. Fraud via voluminous forged writings, a concocted X-ray, and a whole-cloth health insurance form is comprehensible to all, and a medical malpractice trial based on bogus medical records is a prima facie absurdity. Also, whereas words and even deeds are subject to vagaries of interpretation, these remarkable artifacts cannot be undone. They stand as a monument to what the doctors and lawyers would stoop to.

Complaint to the D.C. Board on Professional Responsibility

Among petitioner's complaints or reports of this fraud to numerous organizations having to do with medical or legal matters, one of the most insistent was to the D.C. Board on Professional Responsibility, which is a subsidiary body of the District of Columbia Court of Appeals.[2]

In 1978 petitioner filed with the Board a complaint against the five attorneys who had participated in the trial—two representing herself as plaintiff and three representing the defendants. The complaint is appended hereto as Exhibit A. In addition she sent at least ten follow-up communications to the Board, detailing aspects of the false records and/or other aspects of the fraud. She also made a related complaint against J. Joseph Barse, then president of the Bar Association of the District of Columbia, who had not participated in the trial but was highly implicated with one of the spurious documents.

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[2] This Board was formerly called the Disciplinary Board of the District of Columbia Bar.

The Board responded in July 1979 with some indignation that, in essence, it saw nothing wrong with basing a trial on false evidence.

Motion to set aside jury verdict for fraud upon the court

Ultimately petitioner learned from a layman that she could take the case into her own hands and might be able, under Superior Court Rule 60, to obtain nullification of the judgment in the case.

This Rule 60 of the Superior Court of the District of Columbia is the same as Rule 60 of the Federal Rules of Civil Procedure. It is an exact copy except for deletion of an inapplicable reference to the U.S. Code. Section (b) of the parent rule and of the adopted one states in six clauses and identical words the various grounds and relevant terms upon which relief from a final judgment may be had, and goes on to say that the rule does not limit the power of a court to set aside a judgment for "fraud upon the court."

The phrase "fraud upon the court" was eloquently connotative of the complete and thoroughgoing fraud that petitioner was alleging, and she therefore prepared an affidavit, assembled approximately 150 pages of exhibits in proof of her charges, and submitted this material with a *Motion to Set Aside Jury Verdict for Fraud Upon the Court*. This was in February 1981.[3] The covering motion, which accuses the five attorneys of perpetrating a "fraud upon the court," is appended hereto as Exhibit B.

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[3] At a later time, petitioner found the specifications for "fraud upon the court" laid out in the opinions in these recent cases: *Rozier* v. *Ford Motor Co.*, 573 F.2d 1332 (1978); *Kerwit Med. Products* v. *N. & H. Instruments*, 616 F.2d 833 (1980); and *Williams* v. *Board of Regents of Univ. of Ga.*, 90 FRD 140 (1981). In these cases no such fraud had occurred, but the opinions deal with the concept. Petition-

Denial and appeal—the question at issue

Judge Leonard Braman, who had presided at the instant trial, denied the motion for a procedural reason. He said that policy and procedure concerning "fraud upon the court" had been established by the U.S. Supreme Court in the case of *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U.S. 238 (1944) and that the "doctrine of *Hazel-Atlas*" calls for an independent action for making such a complaint.

Petitioner, after acquainting herself with this doctrine,[4] appealed, presenting the following single issue for review: "WHETHER THE DOCTRINE OF HAZEL-ATLAS, DEALING WITH FRAUD UPON THE COURT, CALLS FOR A MOTION PROCEDURE OR AN INDEPENDENT ACTION." She contended in her Appellant's Brief that her ancillary procedure had been correct and that Judge Braman's opinion that the doctrine calls for an independent action was in error.

Another question raised

The issue petitioner had presented for review seemed a very simple one. However, the Appellee's Brief ignored her own brief and apprised the Court of Appeals that its writer would like this action quashed. Petitioner then submitted an *Appellant's Reply Brief* which described the relations among the parties and raised the question of the Court's possible partiality, in view of its organizational relation with the D.C. Board on Professional Responsi-

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er's allegations far exceeded the requirements of attorney involvement, fabrication of evidence, unconscionable planning, etc. which are said to comprise "fraud upon the court" in these opinions.

[4] It is discussed in MOORE'S FEDERAL PRACTICE, Vol. 7, pages 64-68 and 505-515.

bility and the latter's demonstrated protective position toward the accused lawyers.

She asked "whether the Court would have an interest in supporting the Board's prior action." This was in a section of the Reply Brief entitled "The Court's Position."

The whole of the *Appellant's Reply Brief* is appended hereto as Exhibit C.

Opinion and judgment, D.C. Court of Appeals

The question as to whether the Court could consider her appeal without bias was not acknowledged but the answer became apparent in its *Memorandum Opinion and Judgment*, issued April 8, 1982 and appended hereto as Exhibit D.

In this paper the Judges Mack, Pryor, and Pair did not even mention the procedural issue presented for review. Instead they addressed the fraud itself and backed the Board's position.

Specifically, they affirmed the lower court's denial of petitioner's motion but on the ground that the complaint in it was of the least serious type of fraud redressable under Rule 60(b) and should have been barred by the corresponding time limit. This conclusion they purported to find in the provisions of Rule 60(b) together with precedential cases.

Motion for a ruling on the issue presented for review

Inasmuch as the Court had not actually ruled against her on the issue presented for review, nor even considered it, petitioner did not ask for a rehearing. Instead she filed a *Motion for a Ruling on the Issue Presented for Review*, registering in a supporting memorandum her objections to the Court's having bent facts and law to fit the contentions of an accused party, the lawyer who

wrote the Appellee's Brief. The covering motion is appended as Exhibit E.

The Court responded tersely with an *Order* denying the motion. This is Exhibit F.

All of the foregoing statement will be illuminated by a close perusal of the *Memorandum Opinion and Judgment* of April 8, 1982. It is but an artful burlesque of a judicial decision. As its nature is highly germane to this petition, petitioner demonstrates this in a line by line commentary which, for convenience of reference, is placed in proximity to the document itself as part of Exhibit D.

A NATION-WIDE AND PROFESSION-WIDE PROBLEM

The problem with which this petition deals is not at the level of the clauses and sections and doctrines of Rule 60(b). These have been made to appear as roadblocks to justice as the honest citizen understands it, but petitioner has negotiated these supposed obstacles with patient exactitude, only to be told by the D.C. Court of Appeals: *All rules are off when we are protecting fellow lawyers*. That is the burden of its ruling.

It is appropriate, then, to speak to the *real* problem.

Ethical partiality

The great strong professions of medicine and law are intensely cohesive. Members do not find fault with other members.

This principle has been stated in various ways in various medical codes of ethics. A physician who succeeds another in charge of a case "should not disparage, by

comment or insinuation, the one who preceded him."[5] A dentist who finds indisputable evidence of faulty treatment should "avoid reflection on the previous dentist or the dental profession."[6] An ethical physician "will avoid impugning the reputation of his confreres."[7] What these strictures mean for a patient who is badly injured by a doctor is that he cannot obtain treatment from another doctor.

The legal profession is not so crudely outspoken in its published pronouncements and may be a shade less unitary in fact, but the client injured by a lawyer soon finds that lawyers are defensive of each other too. It is for that reason that petitioner has not been able to obtain legal assistance in a cause that accuses lawyers, and therefore acts *pro se*.

If it be said that these cohesive professions provide grievance boards to which injured patients and clients may apply, then it must be pointed out that team members acting jointly are not less team-spirited than when acting singly.

We take for granted, in disputes in general, that little justice would result if one side's friends and relatives made up the judge and jury. Yet in these grievance arrangements of the self-governing professions, their own team members umpire disputes with outsiders. The result, as a knowledge of human nature would suggest and as petitioner can confirm from experience, is that the

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[5] American Medical Association *Principles of Medical Ethics*, 1971, Section 1, Paragraph 10.

[6] American Dental Association *Principles of Ethics*, 1972, Section 8.

[7] Canadian Medical Association *Code of Ethics*, Article 28.

grievance machinery is more protective than judicial, whether it be that of the American Medical Association, American Dental Association, American Psychiatric Association, or American Bar Association.

This much protectionism/exclusionism is common to medicine and law and it has been discussed here by way of background to a further element that is peculiar to the legal profession. The lawyers' team, besides its grievance machinery, has also control of the country's all-purpose governmental judicial machinery, so that it has the utmost power and opportunity to *cheat* in its own favor.

The D.C. Court of Appeals' refusal to rule on a simple procedural issue, and its gratuitous effort to prevent an investigation of fraud, were not an exercise in good faith of its public powers; they were the arbitrary action of three highly placed members of the American Bar Association in protection of members of the same trade association. They but continued the pattern of protectionism already exhibited by lawyers in general and by the Court's own Board on Professional Responsibility.

Constitutional obligation

At the beginning of this petition, petitioner referred to "a form of judicial partiality that could become operative in any court." She meant this ethical loyalty toward professional brothers, which is presumably latent in all judges everywhere and could come into play when a judge is confronted with a fellow lawyer's wrongdoing. In such a situation the judge has an inevitable conflict of interest, and how far he leans to accommodate or protect his brother is the measure of how far he displaces justice from the reach of the outsider to the club.

Such leaning, whether in legislative, executive, or judicial manifestation of law, it is the business of the Equal

Protection Clause of the Constitution to prevent. "The guaranty [of equal protection of the laws] was aimed at undue favor and individual or class privilege, on the one hand, and at hostile discrimination or the oppression of inequality, on the other." (*Truax* v. *Corrigan*, 257 U.S. 312, 332 (1921)).

Judges' ethical partiality is a definitional loophole in the ideal of equal protection. No one knows better than judges that partiality is antagonistic to justice, and it is for that reason that they recuse themselves in other situations that might elicit partiality, but here there is no one who is definitionally impartial to take their place.

Even so, the Supreme Court still has its obligation to enforce the Constitution. Such obligation, so far as state courts are concerned, was clearly expressed in *Shelley* v. *Kraemer*, 334 U.S. 1 (1948):

> Page 18. "From the time of the adoption of the Fourteenth Amendment until the present, it has been the consistent ruling of this Court that the action of the States to which the Amendment has reference includes action of state courts and state judicial officials. . . .
>
> Page 20. "And when the effect of that action is to deny rights subject to the protection of the Fourteenth Amendment, it is the obligation of this Court to enforce the constitutional commands."

This particular case *(Shelley v. Kraemer)* had to do with restrictive covenants against blacks in regard to housing. In it, the Supreme Court made a distinction between private and public wrong that would seem relevant also to medical/legal discriminations against outsiders.

> Page 1. "Private agreements to exclude persons of designated race or color from the use or occupancy of

> real estate for residential purposes do not violate the Fourteenth Amendment; but it is violative of the equal protection clause of the Fourteenth Amendment for state courts to enforce them."

By analogy, discriminations by professional associations are not unconstitutional, at least so far as the equal protection clause is concerned, but judicial enforcement would be. The analogy is not perfect, however, for in the case of restrictive covenants the judges had merely to be told where their duty lay. In the situation under discussion the judges know where their constitutional duty lies but, as members of their profession, they are in effect parties to the restrictive covenants they are supposed not to enforce. This brings in the problem of partiality, which was not present in the model.

At least, following the skeleton of the dictum in *Shelley* v. *Kraemer*, a two-part proposition can be stated that would more exactly apply to these circumstances:

> "The ethics of private associations which exclude injured patients or clients from medical treatment or legal services and from redress of grievances do not violate the Fourteenth Amendment; but it is violative of the equal protection clause of the Fourteenth Amendment for state judges to be swayed by those discriminatory ethics when adjudicating cases involving lawyers' wrongdoing."

Toward a solution

Judicial partiality in favor of lawyers may be unconstitutional but it is not obvious how it can be remedied when judges inescapably *are* lawyers, up to and including the Supreme Court justices. One does presume, however, that such partiality would be at a minimum at the pinnacle of all court systems.

The suggestion is made here that the Supreme Court might lend a hand to the discriminated-against outsider

via the writ of mandamus. The need is not for closely reasoned interpretations of law, but simply for giving a stabilizing nudge to judges who lean all the way over to protect their kind, denying to an outsider equal or *any* protection of the law.

Petitioner believes that her own case is ideal for testing this possibility.

It is ideal because, in the first place, the facts of attorney involvement in fraud were large and stark. Though it was medical interests that were served by a sham trial, it was the attorneys who staged it and this was after months of forethought.

It is also ideal because of the flagrance with which the Judges Mack, Pryor, and Pair befriended the wrongdoing attorneys. "We agree with them," they say, "that there is nothing much wrong with lawyers using half a dozen fraudulent documents to hoodwink a jury." (See Exhibit D.) Is it conceivable they would say the same if accountants or bankers had done such a thing?

Further, it is ideal because petitioner was pressing the question of intra-professional partiality upon the court's attention both before [8] and after [9] it rendered its decision.

If the Supreme Court were to refuse to condone this kind of judicial partiality in this glaring case—simply by instructing the judges to rule, one way or the other, on the issue presented to them for review—it would remind judges nationally that their duty is to dispense an even-

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[8] In her *Appellant's Reply Brief*.

[9] In the supporting memorandum to her *Motion for a Ruling on the Issue Presented for Review*.

handed justice under court rules and traditions, not to act as defense attorneys for members of their club.

The alternative would seem to be confirmation of an unspoken and *de facto* doctrine—that lawyers are privileged to practice fraud to any degree.

SUMMARY AND PRAYER

Petitioner moved to set aside a judgment for "fraud upon the court" perpetrated by all the attorneys in a case. The motion was denied on the procedural ground that such an allegation requires an independent action. Petitioner appealed that specific question: Post-trial motion or independent action?

The District of Columbia Court of Appeals refused to rule on the issue presented for review, holding that the type of fraud alleged by petitioner may not be complained of after one year.

Petitioner charges—nay, explains—that the judges concerned have abdicated their judicial duties to act as lawyers protecting lawyers. She maintains that such discrimination denies her and anyone else in like circumstances equal protection of the laws.

Believing that for every constitutional right denied there should be a remedy, she prays that the Supreme Court will issue to the Judges Mack, Pryor, and Pair a writ of mandamus directing them to rule on the issue presented to them for review: WHETHER THE SUPREME COURT DOCTRINE OF HAZEL-ATLAS, DEALING WITH FRAUD UPON THE COURT,

CALLS FOR A MOTION PROCEDURE OR AN INDEPENDENT ACTION.

Then she will proceed accordingly.

Respectfully submitted,

MARILYN RICE, PRO SE
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APPENDIX

(Documents are in Chronological Order)

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Exhibit A.	Complaint to D.C. Board on Professional Responsibility, August 15, 1978, with enclosed letter of September 27, 1976 ...	1a
Exhibit B.	Motion to Set Aside Jury Verdict for Fraud Upon the Court, February 19, 1981 (Affidavit and exhibits are not included because of their length.)	7a
Exhibit C.	Appellant's Reply Brief, December 31, 1981	9a
Exhibit D.	Memorandum Opinion and Judgment, D.C. Court of Appeals, April 8, 1982, and Commentary by Petitioner	15a
Exhibit E.	Motion for a Ruling on the Issue Presented for Review, April 19, 1982 (Supporting memorandum is not included because it covers the same ground that is covered elsewhere in this petition.) ...	29a
Exhibit F.	Order, D.C. Court of Appeals, May 5, 1982	31a

Exhibit A

2001 16th Street, NW (Apt 504)
Washington, D.C. 20009
(202-462-7145)

August 15, 1978

Fred Grabowsky, Esquire
Bar Counsel
The Disciplinary Board
The District of Columbia Bar
Suite 840
1426 H Street, N.W.
Washington, D.C. 20005

Dear Mr. Grabowsky:

Your name was given me by Mr. James Bradner of the Center for Professional Discipline of the American Bar Association in Chicago.

I should like to make a complaint of unethical conduct on the part of five attorneys. I am *assuming* it is unethical for lawyers to represent false documents as being genuine in order to support false testimony against a plaintiff in a lawsuit.

The suit was *Rice* v. *Nardini and the Psychiatric Institute*, CA 703-74. The issue was loss of memory due to electric shock treatment. The case was of historic interest in the psychiatric profession in that it was the first time in 40 years of such complaints that one had been litigated. I was the plaintiff.

The false documents concerning me were:

(1) The hospital records of Dr. Peter S. Mendelis, who was my psychiatrist at the hospital (retroactively forged in large part).

(2) The private office records of Dr. Peter S. Mendelis for the period of time I was seeing him after I left the hospital (retroactively forged in their entirety).

(3) An enormously padded Blue Shield billing showing services that did not take place (my whole bill for two months was compressed into half a month).

(4) A fake dental X-ray showing nice looking front teeth when I had no front teeth.

I should explain that this last strange-sounding item was quite important in the case. It was the mutilation of my mouth by an orthodontist, Dr. James P. Kerrigan, that had led to my hospitalization for depression. The attorneys contended that Dr. Kerrigan had done me no harm and that I was, instead, depressed because I was an insane woman. The point of the fake X-ray was to make it appear that Dr. Kerrigan had done me great good. That "proved" my insanity; and my insanity was supposed to have caused me to lose my memory (or imagine I lost it).

The attorneys concerned were: *James C. Greeg*, *Peter R. Sherman*, *Raymond A. Yost*, *Philip G. Sunderland*, and *Bruce J. Terris*.

The three first listed were attorneys for the defense. Their motivation was at least clear. I had heard that, in a malpractice suit, the weaker the defense's position is on medical grounds, the more vigorous is the attack on the plaintiff. Viewed in that light, this mountain of fiction which the defense had prepared was flattering, and proved the justice of my complaint.

The two last listed were theoretically on my side. Their motivation in supporting all the false documents, and the defense's charge that I was insane, is not at all clear. There had never been any question of the spurious character of the forgeries. I enclose a letter I wrote to Philip Sunderland when I first saw the hospital records, at which time I supposed of course they would be challenged. The private office records were even worse forgeries, with the time frame so muddled that every reference to a recognizable event appeared at an earlier time than the event happened. Yet Mr. Sunderland proceeded to send these forgeries to the expert witnesses, representing them as real, plus also his psychiatric opinion that my depression was of the endogenous (insane and without reason) type. The Blue Shield form and the dental X-ray I had not myself seen prior to the trial; I don't know whether my

attorneys had or not. However, when the dental X-ray was shown, creating quite a sensation in the courtroom, I wanted Mr. Terris to show photographs of what I actually looked like before and after Dr. Kerrigan's ministrations, but he wouldn't do it. He said if I tried to say anything he would put me out of the courtroom.

Mr. Terris and Mr. Sunderland have subsequently refused to give any reason for treating all these false documents as genuine, or to guide my husband and me in taking whatever action should be taken when a trial is conducted wholly on false evidence. We believe that, at the very least, all five of these attorneys should be subject to some kind of disciplinary action. There may, however, be other action that should be taken, and we would appreciate your opinion. We can, of course, provide considerably more detail on the matters outlined here.

Sincerely,

/s/ Marilyn Rice
MARILYN RICE

Enclosure

cc:
James C. Gregg, Esq.
Peter R. Sherman, Esq.
Raymond A. Yost, Esq.
Philip G. Sunderland, Esq.
Bruce J. Terris, Esq.
Dr. John E. Nardini
Psychiatric Institute of Washington
Dr. Peter S. Mendelis
Dr. James P. Kerrigan
National Committee on Patients Rights
Coalition Against Forced Treatment
Citizens Commission on Human Rights
Quebec Patients Rights Association
Patients Rights Center, Inc.

U.S. Civil Service Commission
Womens Legal Defense Fund
Council for Public Interest Law
Mental Health Law Project
American Bar Association
American Civil Liberties Union
National Institute of Mental Health
National Commission on Health Records
Health Care Finance Administration
D.C. Department of Human Resources
Amer Bd of Psychiatry and Neurology
American Dental Association
University of Pittsburgh Dental School
U.S. District Attorney
Judge Leonard Braman
Committee on the Judiciary

2001 16th Street, NW (Apt 504)
Washington, D.C. 20009

September 27, 1976

Mr. Philip Sunderland
1908 Sunderland Place, NW
Washington, D.C. 20036

Dear Phil,

Thanks for sending the hospital records. They are fascinating. Dr. Nardini's records are authentic and the nurses' notes are authentic but the only paper of Mendelis's that is authentic is the "History" which is dated February 20, 1973.

Mendelis's "Progress Notes," which begin on February 14, 1973, are pure fiction, composed long after the fact. Not only are the important matters totally at variance with history, but he didn't even get the little easily checkable details right in his composition. For instance, he has me getting my first electric shock on the wrong day and being discharged from the hospital on the wrong day.

When his notes are lined up with the nurses' notes of the same days, they are very funny. See attached excerpts.

As for the scurrilous document that purports to have been written on May 25, 1973, I think it was actually written very recently. Note that it begins by describing me as a 53-year old woman. That is my *present* age. I think he must have subtracted my birth date, 1923, from 1976.

Do you want to tell Raymond Yost that these fictional hospital records are not acceptable and he must fork over the original log?

Or do you want me to go after Mendelis on my own?

Or do you want to tear him to pieces in the court room and send him off to jail for perjury—after which we can get on with the interesting part of the case concerning brains and memory?

Anyway, my inclination is to handle Mendelis in the severest possible way, whatever that may be. When I left him out of this case because I felt sorry for him, I didn't expect him to turn around and be the hatchet man for the other side.

I have typed up most of the handwritten material in the hospital file and will give it to you the next time I am over.

Marilyn
/s/ MARILYN RICE

Exhibit B

IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

Civil Action No. 703-74
Civil I — Judge Braman

MARILYN RICE,

Plaintiff

v.

DR. JOHN E. NARDINI & PSYCHIATRIC INSTITUTE,

Defendants

FILED February 19, 1981

MOTION TO SET ASIDE JURY VERDICT FOR FRAUD UPON THE COURT

MARILYN RICE, plaintiff in *Marilyn Rice* v. *Dr. John E. Nardini and the Psychiatric Institute of Washington, CA 703-74*, a proceeding concerning medical malpractice which was tried from December 15, 1976 through January 7, 1977, moves the Court, pursuant to Rule 60(b)(6), to set aside the verdict for defendant Nardini in said proceeding for *fraud upon the court.*

Plaintiff asks this action, constituting declaration of a mistrial, in recognition that *virtually all of the medical and dental records concerning herself* which were read or displayed at trial, being represented by defense counsel and plaintiff's counsel as bona fide, true, and valid documents, were *forged or otherwise false.*

Attached is an affidavit in support of this motion, including exhibits, and a proposed order.

The directed verdict for defendant Psychiatric Institute is not contested.

/s/ Marilyn Rice

MARILYN RICE (pro se)
2106 S. 5th Street (Apt 1)
Arlington, Va. 22204
(703-979-5398)

POINTS AND AUTHORITIES

1. Rule 60(b)(6), Superior Court Rules of Civil Procedure.

/s/ Marilyn Rice

MARILYN RICE (pro se)

Note: Affidavit and exhibits are not included here because of their length.

Exhibit C

DISTRICT OF COLUMBIA COURT OF APPEALS

FILED Dec 31, 1981

REPLY BRIEF OF APPELLANT, MARILYN RICE
Appeal No. 81-996

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Appellees' Position 2
The Court's Position 4

Appellant's Position

The issue presented for appellate review arose at a hearing on May 21, 1981, devoted to discussion of plaintiff Rice's *Motion to Set Aside Jury Verdict for FRAUD UPON THE COURT*. At this hearing Judge Leonard Braman pointed to the case of Hazel-Atlas Glass Company vs. Hartford-Empire Company, 322 US 238, 1944, as governing procedure for dealing with fraud upon the court (page 9 of transcript), and noted that this case reached back nine years to set aside a judgment (page 10). He constantly assumed, however, that the doctrine of Hazel-Atlas calls for charges to be brought in the form of an independent action (pages 10, 12, 13, 14) and he denied plaintiff's motion in the following words (page 16):

> ". . . I can appreciate your eagerness to get to the substance of the question, but the antecedent question is whether this is a proper forum for establishing the character of the documents and whether this Court has any power to do anything about it.
>
> ". . . the question before this court is whether the Court has the power under the motion procedure which you have

elected to follow, whether the Court has the power to touch the 1977 judgment.

". . . There may be judicial power to touch it under an independent action of the Hazel-Atlas variety. . . . I will deny [the motion] without prejudice to the filing of an independent action."

". . . you have the right to appeal my ruling. . . ."

Plaintiff then researched this Hazel-Atlas case and found that there literally was no such thing as "an independent action of the Hazel-Atlas variety." On the contrary, this case had settled a preceding controversy over the applicability of an ancillary vs. independent action for examining fraud charges, and had settled it in favor of *an ancillary proceeding*, at least where fraud of such dimensions as to be designated "fraud upon the court" was concerned.

Unfortunately, by the time plaintiff had discovered this honest error in Judge Braman's recollection, he had retired and could not correct it.

She therefore did appeal, and in her *Brief of Appellant*, filed November 17, 1981, presented the following simple either-or issue for review: "WHETHER THE DOCTRINE OF HAZEL-ATLAS, DEALING WITH FRAUD UPON THE COURT, CALLS FOR A MOTION PROCEDURE OR AN INDEPENDENT ACTION." The answer was so clearcut for anyone who chose to look it up that there was no room for argument in the ordinary sense of the word. Plaintiff nevertheless, to clarify the whole context of the issue, presented under the caption of Argument a distillation of information from MOORE'S FEDERAL PRACTICE on the fraud provisions of Rule 60(b) and the doctrine of Hazel-Atlas, explaining how it came to be that the latter contemplates a post-trial motion as the vehicle of placing before a court a charge of "fraud upon the court."

It would seem that this procedural point could now be settled, and the case go back to the lower court for substantive action.

Appellees' Position

Appellees' counsel have never taken a position on the procedural issue on appeal, which originated between Judge Braman and plaintiff. Unless they now wished to contend that the Hazel-Atlas doctrine calls for an independent action, there was no necessity for their submitting a brief. The matter could have been kept as simple as it actually is. Since they did submit a brief, *and one which does not even make passing reference to the issue on appeal*, the purpose of the submission bears discussion.

Relations among the parties

That purpose can be understood only in the light of a clear understanding of the unusual relations among the parties.

On one side is Marilyn Rice, plaintiff in the original proceeding of *Rice* v. *Nardini et al.* On the other side are defendants and their counsel plus also, in the role of third parties, plaintiff's counsel in the original proceeding. In this post-trial action, plaintiff has accused all five attorneys in the case (the two who were formerly ostensibly on her side and the three on the other) of perpetrating a fraud upon the court, consisting of carrying on a mock trial for three weeks with "medical records" forged on the eve of the trial and assorted other spurious documents and displays.

There are then two kinds of adversary relationships. In the background is Marilyn Rice v. Dr. Nardini et al. In the foreground is Marilyn Rice v. defense counsel Gregg, Sherman, and Yost and plaintiff's former counsel Terris and Sunderland. The documents which are at present being exchanged refer to the foreground relationship, wherein plaintiff has accused all the attorneys of fraud upon the court.

The apportionment of responsibility among them was as follows. The fraudulent exhibits were manufactured on the defendants' side of the case, and defendants' attorneys produced most of them before the trial. Such an act of desperation could not have won them the case, however. It amounted to an

admission that they could make no honest defense, and would have handed the case to plaintiff "on a silver platter" if her own attorneys had exposed it. But plaintiff's attorneys, rather than rising to this opportunity, concealed defendants' attempted fraud and brought it to successful fruition for reasons of their own. Thus it was plaintiff's attorneys who played the crucial role in the fraud upon the court.

Of course, the official gainers by the fraud were the defendants, and so it is that Mr. Gregg, chief counsel for the defendants, now finds himself in the role of defender of himself and the other four attorneys. (To further complicate the attorney relations, an additional name James F. Bromley appears as "Attorney for Appellee, John E. Nardini" on the brief submitted by Mr. Gregg. This man has not entered an appearance in the case, and what authority or responsibility he may hold is unknown to plaintiff.)

In summary, Mr. Gregg is attempting to defend himself and the other attorneys in the *Brief for Appellee, John E. Nardini*, mailed December 21, 1981. He has no interest in which fraud-charging procedure may be correct under Hazel-Atlas, but simply seeks to kill the action, i.e. prevent plaintiff's fraud charges from being investigated.

Appellees' brief

The brief itself totally ignores the issue plaintiff is appealing, as mentioned above, but presents one or two (depending on how they are counted) other issues which apparently Mr. Gregg is asking the appeals court to substitute for plaintiff's issue. Clearly such substitution is out of order. Nevertheless, plaintiff will comment on these "issues presented for review."

The first is: *"Whether a motion to set aside a verdict filed four years after the verdict was rendered was timely filed."* This is indeterminate. The answer would depend on the ground for the motion and the reason for the delay.

The second issue rewords the first. Instead of asking whether the motion was timely filed, it asks whether an

untimely motion is properly denied (asserting as a premise that plaintiff's counsel conducted an adversary-type procedure).

There follows an independent "argument," unrelated to anything in appellant's brief, and culminating in citation of two cases chiefly relied upon to prove that plaintiff's *Motion to Set Aside Jury Verdict for Fraud Upon the Court* was not timely filed. Upon referring to these, plaintiff found to her amusement that neither has anything to do with a jury verdict and neither has anything to do with fraud of any kind, let alone "fraud upon the court." They seem to have been cited to prove that this is a legal document.

The issue Mr. Gregg is actually presenting is whether the Appeals Court will help him block investigation of the alleged fraud on the part of the five attorneys.

The Court's Position

Plaintiff has made very serious charges against five Washington attorneys. Attorneys and judges are part of the same professional community and there is a natural tendency in all such communities for members to be protective of their fellows. It is only realistic for plaintiff to recognize this.

Additionally, plaintiff has already had experience with the legal profession's zeal to police itself. Before she launched her Motion, she made a complaint to the Board on Professional Responsibility of the D.C. Bar about the five lawyers concerned. The Board's action consisted in secret consultation with the accused parties followed by a nonsensically worded brush-off.

Inasmuch as the Board on Professional Responsibility is organizationally a part of the D.C. Court of Appeals, this prior action raises another question: whether the Court would have an interest in supporting the Board's prior action.

Plaintiff would be grateful if the Judges of the Court, in their own persons, would consciously consider this question among themselves.

Respectfully submitted,

/s/ Marilyn Rice

MARILYN RICE, Pro Se
2106 S. 5th Street (Apt 1)
Arlington, Va. 22204
(979-5398)

Exhibit D

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 81-996

MARILYN RICE,

Appellant,

v.

JOHN E. NARDINI, *et al.*,

Appellees.

Appeal From The Superior Court
Of The District Of Columbia
Civil Division

CA 703-74

(Hon. Leonard Braman, Trial Judge)

(Argued March 31, 1982 Decided April 8, 1982)

BEFORE: Mack and Pryor, Associate Judges, and Pair, Associate Judge, Retired

FILED Apr 08 1982

MEMORANDUM OPINION AND JUDGMENT

This appeal is from the denial of a Super. Ct. Civ. R. 60(b)(6) motion for relief from a judgment entered four years earlier. Finding no reversible error, we affirm.

In 1977, appellant filed suit against appellee, Dr. John E. Nardini alleging medical malpractice involving treatments received by her while a patient of appellee at the Psychiatric Institute. [1] Appellant's specific complaint was that she was

[1] Appellant's original complaint named the Psychiatric Institute as a codefendant. During the trial, a motion for a directed verdict was granted, thereby dismissing Psychiatric Institute from the suit.

administered electric shock treatments without being fully informed of possible adverse effects. On January 7, 1977, a jury returned a verdict for appellee upon which judgment was entered. More than four years later, appellant filed in February 1981, a motion to set aside the judgment for fraud upon the court, claiming that six of the medical records introduced into evidence at the 1977 trial were fraudulent. According to appellant, this fraud was perpetrated by appellee with the knowledge and cooperation of appellant's trial counsel. Appellant sought relief pursuant to Super. Ct. Civ. R. 60(b)(6). [2]

Clause (6) of Rule 60(b) permits the court to relieve a party from final judgment for "any other reason justifying relief" providing only that the motion be filed within a "reasonable time." Clause (3), which specifically redresses fraud, also requires filing within a "reasonable time," but under no circumstances later than one year after the judgment complained of is entered. Appellee contends that although the motion cites 60(b)(6) as a basis for relief, appellant's complaint was of fraud coming within 60(b)(3). We agree.

To justify relief under Super. Ct. Civ. R. 60(b)(6), there must be some compelling reason not covered by the other clauses of the rule. *Day* v. *United Securities Company*, D.C. App., 272 A.2d 448, 451 (1970). Here, appellant's claim involved the type of fraud encompassed by Clause (3) and should have been filed within the one-year period prescribed. Clearly, Clause (6) was not intended to relieve a litigant from the time requirement of Clause (3). *See Harris* v. *Harris*, D.C. App., 304 A.2d 635, 636 (1973). Moreover, appellant knew of the alleged fraud in 1977, but waited four years before seeking

---

[2] In relevant part, Rule 60(b) provides:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; . . . (6) any other reason justifying relief from the operation of the judgment.

relief. Rule 60(b) is not intended to be a substitute for an appeal that has been foregone. *Leeks* v. *Leeks*, D.C. App., 316 A.2d 859, 860 (1974). In such a case, possible prejudice to the non-moving party militates strongly in favor of finality.

Since the motion was not filed within the time prescribed by Clause (3), the trial court properly denied appellant the relief sought. Accordingly, it is

ORDERED and ADJUDGED that the judgment of the trial court be, and hereby is, affirmed.

FOR THE COURT:

/s/ Alan I. Herman
ALAN I. HERMAN,
Clerk of the Court.

Copies to:

Honorable Leonard Braman

Clerk, Superior Court

Ms. Marilyn Rice
2106 S. 5th Street
Apt. 1
Arlington, Virginia 22204

James C. Gregg, Esquire
James F. Bromley
Macleay, Lynch, Bernarhard, Gregg & Attridge
1625 K Street, N.W.
Washington, D.C. 20006

COMMENTARY BY PETITIONER

Traditionally, a litigant appeals a lower court judgment on grounds of error in the application of law, and an appeals court considers the specific question(s) raised when it affirms, reverses, or takes other action with regard to the lower court judgment. Here, however, though a traditional appeal was made, the Court affirmed a lower court judgment on grounds invented by itself, positing a bizarre construction of court rules, and all the while pretending that it was but carrying out its normal appellate function.

How could such a decision have been issued?

The answer is that this is a *memorandum* opinion and judgment, which means that it would not ordinarily be seen by anyone other than the parties. (Robert L. Stern: APPELLATE PRACTICE IN THE UNITED STATES, 1981, Chapter 10, pages 486-490.) The perpetrators and beneficiaries of the fraud could be expected to be content, the *pro se* protester of the fraud to be helpless, and no one else ever to be the wiser.

Petitioner does not question the right of a state court system to interpret its own rules, but she does challenge its right to make *sub rosa* interpretations which apply to one case only. If this document were to stand, it should be published and discussed, for it amounts to a statement that complaints of attorney fraud, no matter how extreme, are not permitted to be made in the District of Columbia court system after one year.

What the document does say is by no means apparent from its surface. It has to be examined in conjunction with the facts it suppresses or distorts; in conjunction with the normal interpretation of Federal Rule 60(b) (with which published interpretations of D.C. Rule 60(b) appear to coincide); and in conjunction with the dicta in the cited cases.

Petitioner now proceeds with such an analysis.

First to be noted, because of first importance, is *what isn't there*. Three stout negative pretenses—not premises, but

pretenses—are firmly gripped throughout the memorandum, but never stated. They are:

(1) That there is no such special category of fraud as "fraud upon the court."

(2) That petitioner did not file a motion to have a judgment set aside for "fraud upon the court."

(3) That petitioner did not submit for appellate review a procedural question concerning "fraud upon the court."

By such disingenuous device, the judges dispose of the appeal—i.e. by nonrecognition that there ever was such an appeal.

The visible content of the memorandum becomes, then, a sort of front document, wherein the Court pettifogs to the conclusion that petitioner's charges in the lower court must be quashed. Let us look at this specious front document chunk by chunk, seriatim. Quotes are in italics, comments follow

FIRST PARAGRAPH

1. *This appeal is from denial of a Super. Ct. Civ. R. 60(b)(6) motion for relief from a judgment entered four years earlier.*

This sentence should read: "This appeal is from denial of a Super. Ct. Civ. R. 60(b) motion for relief from a judgment for fraud upon the court. The judgment was entered four years earlier."

Please refer to the motion itself, included herewith as Exhibit B, and note the title and content of the motion.

Petitioner actually sought relief pursuant to the passage in Rule 60(b) which reads: "This rule does not limit the power of a court . . . to set aside a judgment for fraud upon the court." The very title of the motion was taken from this passage, i.e., "Motion *to set aside* jury verdict *for fraud upon the court.*" That petitioner was charging the species of fraud called "fraud upon the court" was totally clear to the D.C. Court of Appeals

not only from the motion itself but from numerous subsequent pleadings and especially her 21-page Appellant's Brief. This latter constituted a dissertation on the fraud provisions of Rule 60(b) with special reference to "fraud upon the court."

The citation of clause 6 in the motion was owed petitioner's literal reading and interpretation of the Rule. The Rule's six numbered clauses cover all logically possible grounds for relief from a judgment and she assumed that the pertinent grounds clause should be cited, even though she alleged the *degree* of fraud represented by the phrase "fraud upon the court." Clause 3, in which the word fraud appears, refers only to adversary fraud, and therefore the residual clause 6, "any other reason," would comprehend the unusual fraud situation of which she complained.

In common sense terms, fraud by an adverse party and/or his counsel is one thing; fraud in which one's own counsel joins is something else. The distinction goes to the distinction between an adversary proceeding and a lynching party. This was petitioner's reasoning in selecting clause 6.

At a later time, she learned from MOORE'S FEDERAL PRACTICE that this categorization of the fraud situation by grounds clause had been correct. (See Vol. 7, pages 290-92, 342-43, 368 (notes), 375, 404.) Also, the mention of a numbered clause does not detract from an allegation of "fraud upon the court," for the power of a court to set aside a judgment for fraud upon it is an additional or cumulative power. (Ibid., page 290.) The mention of clause 6 was, however, a non-necessity. According to the same treatise, page 346: "In many situations exact categorization [by clause of Rule 60(b)] is very difficult and, in the main, should be avoided except where the category is obvious or where exact choice is necessary to decision."

But the D.C. Court of Appeals has seized upon the mention of clause 6 to pretend that petitioner did not move for relief due to the grave and serious phenomenon of "fraud upon the court" but cited a numbered clause without more. This is untrue.

2. *Finding no reversible error, we affirm [the denial].*

The error appealed was the lower court's ruling that an allegation of "fraud upon the court" requires an independent action rather than a post-trial motion, citing as authority *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U.S. 238 (1944).

The court denied the motion "without prejudice to filing of an independent action"; referred petitioner to the doctrine of *Hazel-Atlas* for the contours of such independent action; and advised her that she had a right to appeal this ruling. (Pages 16 and 17 of transcript of hearing, May 21, 1981.) In an order denying a motion for reconsideration, he reiterated this position: "While the court denied the motion, it did so without reflection on the merits of plaintiff's claims. . . . The narrow ground for the ruling was that the remedy available, if any, was by the independent action under the doctrine of *Hazel-Atlas*." (Order, July 1, 1981.)

The ruling, was, however, in error, for, as research showed, *Hazel-Atlas* calls for an ancillary proceeding. Petitioner did appeal and the question presented for review was: "WHETHER THE DOCTRINE OF HAZEL-ATLAS, DEALING WITH FRAUD UPON THE COURT, CALLS FOR A MOTION PROCEDURE OR AN INDEPENDENT ACTION."

But the D.C. Court of Appeals, rather than rule on the issue, now pretends, in conformance with its pretense that petitioner did not charge "fraud upon the court," that no such error was made or appealed.

SECOND PARAGRAPH

3. *In 1977, appellant filed suit against appellee, Dr. John E. Nardini alleging medical malpractice involving treatments received by her while a patient at the Psychiatric Institute.[1] Appellant's specific complaint was that she was administered electric shock treatments without being fully informed of possible adverse effects. On January 7, 1977, a jury returned a verdict for appellee upon which judgment was entered.*

Footnote 1. Appellant's original complaint named the Psychiatric Institute as a codefendant. During the trial, a motion for a directed verdict was granted, thereby dismissing Psychiatric Institute from the suit.

This history is largely correct. Actually suit was filed in 1974, the Psychiatric Institute was brought in by amendment, and her specific complaint was considerably more specific than is said here.

4. *More than four years later, appellant filed in February 1981, a motion to set aside the judgment for fraud upon the court, claiming that six of the medical records introduced into evidence at the 1977 trial were fraudulent.*

This is the only passage in the Memorandum where the phrase "fraud upon the court" appears. Note that it is dropped casually as if it were from petitioner's own idiosyncratic language rather than from the language of Rule 60(b), where it designates the highest degree of courtroom fraud.

The import of the phrase is further undercut by a vague understatement of petitioner's charges.

What petitioner actually claimed in her motion (Exhibit B) was: "that *virtually all of the medical and dental records concerning herself* which were read or displayed at trial were *forged or otherwise false.*" (The number six is correctly taken from the itemization of these records in the affidavit accompanying the motion.)

5. *According to appellant, this fraud was perpetrated by appellee with the knowledge and cooperation of appellant's trial counsel.*

This seems to omit defense counsel as participants in the fraud, whereas petitioner's motion does not. In any event, petitioner's own emphasis was different. As stated in her Appellant's Reply Brief, where she discussed the apportionment of responsibility among the accused attorneys: "Plaintiff's attorneys . . . concealed defendants' attempted fraud and brought it to successful fruition for reasons of their own. Thus it was plaintiff's attorneys who played the crucial role in the fraud upon the court." (Exhibit C, page 12a.)

6. *Appellant sought relief pursuant to Super. Ct. Civ. R. 60(b)(6).* [2]

See comments under item 1 above.

7. *Footnote 2. In relevant part, Rule 60(b) provides:*

> *On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . .(3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; . . . (6) any other reason justifying relief from the operation of the judgment.*

Here are correctly quoted the two numbered clauses of Rule 60(b) whose fraud coverage is discussed under item 1 above.

For perspective it needs to be borne in mind that Rule 60(b) covers all possible grounds for relief from a judgment, not just fraud. Clauses 1 through 5 deal with "common situations easily envisaged" and clause 6 with "the extraordinary, novel, or unusual situation." (MOORE'S FEDERAL PRACTICE, Vol. 7, page 904.)

THIRD PARAGRAPH

8. *Clause (6) of rule 60(b) permits the court to relieve a party from final judgment for "any other reason justifying relief" providing only that the motion be filed within "a reasonable time."*

The quotation is correct. A novel situation could be trivial or momentous, and a reasonable time could be short or long in the light of all the circumstances. (If petitioner were relying on clause 6, the circumstances preventing earlier filing would have needed to be addressed by the lower court.)

9. *Clause (3), which specifically redresses fraud, also requires filing within "a reasonable time," but under no circumstances later than one year after the judgment complained of is entered.*

This statement implies that clause 3, and nothing else, redresses fraud. That is incorrect.

What clause 3 specifically redresses is misconduct of an adverse party—including fraud but also including lesser types of misconduct, such as misrepresentation. It does not redress misconduct of anyone *but* an adverse party. Time limit: One year.

Fraud on the part of a third party, such as an independently acting witness or jury member or a litigant's own counsel, is redressed by clause 6. So would be a mixed situation. Time limit: A reasonable time.

In addition, fraud of such extreme degree that it defiles the court itself, can be redressed under the "fraud upon the court" provision, regardless of who was involved and regardless of when the matter comes to the attention of the court.

In the context of pure adversary fraud, Moore puts this last proposition this way: "Clause (3) does not . . . limit the power of a court 'to set aside a judgment for fraud upon the court' and there is no time limitation upon this power." (MOORE'S FEDERAL PRACTICE, Vol. 6A, page 4028.)

10. *Appellee contends that although the motion cites 60(b)(6) as a basis of relief, appellant's complaint was of fraud coming within 60(b)(3). We agree.*

Here the Court pretends that some sort of issue about clauses had been presented for review, though there was no such issue.

In positive terms, it holds that a complaint of fraud by all the attorneys in a case, with the complainant's own counsel playing the crucial role, comes under clause 3.

FOURTH PARAGRAPH

11. *To justify relief under Super. Ct. Civ. R. 60(b)(6), there must be some compelling reason not covered by the other clauses of the rule. Day v. United Securities Company, D.C. App., 272 A2d 448, 451 (1970).*

The cited case illustrates the principle that clause 6 covers grounds not covered by the other clauses.

In this case the purchaser of an automobile sought to have a default judgment set aside under Rule 60(b)(6) on grounds that his 15-year-old son, with whom the complaint and summons had been left, had neglected to turn them over to him. The Court ruled that this was not an "exceptional or extraordinary situation" but was, at best, excusable neglect, which is one of the grounds for relief under clause 1.

12. *Here, appellant's claim involved the type of fraud encompassed by Clause (3) and should have been filed within the one-year period prescribed.*

In item 9 above, and possibly item 10, the Court implied that clause 3 alone redresses fraud. Now it speaks of "the type of fraud encompassed by Clause (3)," admitting that clause 6 also redresses fraud.

However, it insists that a claim of fraud on the part of all the attorneys in a case, with the claimant's own counsel playing the crucial role, comes under clause 3. The implication is that this is

not an exceptional situation in the District of Columbia court system. We are left to wonder what type of fraud would come under clause 6 in this jurisdiction.

13. *Clearly, Clause (6) was not intended to relieve a litigant from the time requirement of Clause (3). See Harris v. Harris, D.C. App., 304 A2d 635, 636 (1973).*

Clearly.

However, the cited case does not deal with the time limits of clause 3 versus clause 6. It deals with an appeal versus clause 6. Also it has nothing to do with fraud.

In this case a wife who had received an adverse judgment in a divorce proceeding and who had not appealed within the time prescribed, later attempted to obtain a reversal via clause 6 of Rule 60(b). She was advised that the Rule can't be used to extend the time limit for an appeal.

14. *Moreover, appellant knew of the alleged fraud in 1977, but waited four years before seeking relief.*

It is literally true that four years elapsed between the judgment and the motion for relief.

However, by alluding to this interval three times (see also items 1 and 4 above) and by the loaded language "waited four years before seeking relief," the Court seeks to convey a picture of long indifference followed by sudden caprice—a picture it knows to be false. It knows from petitioner's affidavit that her efforts to set matters right were unceasing over those four years and it also knows of the effort she made through its own subsidiary agency the D.C. Board on Professional Responsibility.

In actuality, petitioner's quest for relief has been as massive as the fraud itself.

In her complaint to the Board, made in 1978 (herewith, as Exhibit A), it may be noted that she sent information copies to a large number of persons and organizations. Many of these

(and many others) petitioner also complained to directly concerning specific elements or facets of the fraud, either before or after her complaint to the Board. And in 1980 her campaign to nullify this fraud was reported in published form under the title "The Medico-Legal Adventures of Marilyn Rice: Selected Letters and Papers" (APAPA, Box 9, Bayside, New York, N.Y. 11361, $4.00).

Petitioner did not "wait" four years before seeking relief under Rule 60(b). It was four years before she heard of Rule 60(b).

15. *Rule 60(b) is not intended to be a substitute for an appeal that has been foregone. Leeks v. Leeks, D.C. App., 316 A2d 859, 860 (1974).*

It is certainly true, as has already been illustrated in the divorce case above, that Rule 60(b) is not intended to give relief on a ground that was open to the movant by appeal. This second illustration concerns a squabble over real estate between a decedent's father and widow. The widow lost, neglected to appeal, and subsequently sought relief under Rule 60(b), apparently under clause 4. Relief was denied, inasmuch as she could have appealed.

But the converse is also true. "An appeal may not be taken as a substitute for a motion under Rule 60(b)" (MOORE'S FEDERAL PRACTICE, Vol. 7, page 424).

These appeals court judges know that a judgment based on fraud is not appealable. Judicial error is appealable but fraud is grounds for a motion under Rule 60(b). Yet they labor and labor the pretense that petitioner should have presented her allegations by appeal, even pretending to cite cases to prove the point. In this more loudly than in anything else, they demonstrate the character of this document.

16. *In such a case, possible prejudice to the non-moving party militates strongly in favor of finality.*

The proposition is: Fraud is not appealed, should be concealed.

FIFTH PARAGRAPH

17. *Since the motion was not filed within the time prescribed by Clause (3), the trial court properly denied appellant the relief sought. Accordingly, it is—ORDERED and ADJUDGED that the judgment of the trial court be, and hereby is, affirmed.*

It may be recalled that the question on appeal was as to the proper procedure for complaining of "fraud upon the court" perpetrated by five officers of the court.

The appeals court holds that, under Rule 60(b), such fraud may not be complained of by any procedure after one year, regardless of circumstances, and pretends that this was the stance of the trial court.

Exhibit E

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 81-996

MARILYN RICE,
Plaintiff-Appellant,

v.

JOHN E. NARDINI, *et al.*,
Defendants-Appellees.

REC'D Apr 19 1982

MOTION FOR A RULING ON THE ISSUE PRESENTED FOR REVIEW

Reference is to appellant's appeal from denial of a "Motion to Set Aside Jury Verdict for Fraud Upon the Court"; and to the Court of Appeals' "Memorandum Opinion and Judgment" issued April 8, 1982.

Said opinion and judgment affirmed the denial without recognition of the lower court's grounds for denial and without reference to the issue presented for review.

Appellant hereby moves the Appeals Court to rule on the issue presented for review or to communicate to appellant its reasons for not ruling.

Attached is a memorandum in support of this motion.

/s/ Marilyn Rice

MARILYN RICE (pro se)
2106 S. 5th Street (Apt 1)
Arlington, VA 22204
(979-5398)

Note: Supporting memorandum is not included here because it covers the same ground that is covered elsewhere in this petition.

Exhibit F

DISTRICT OF COLUMBIA COURT OF APPEALS
500 Indiana Avenue, N.W.
Washington, D.C. 20001
(202) 638-7113

No. 81-996

MARILYN RICE,

Appellant,

v.

JOHN E. NARDINI, *et al.*,

Appellees.

BEFORE: Mack and Pryor, Associate Judges; and Pair, Associate Judge, Retired.

FILED May 5 1982

ORDER

On consideration of appellant's pro se "motion for a ruling on the issue presented for review," it is

ORDERED that the aforesaid motion is denied.

PER CURIAM